No. 03-407
October Term, 2003
IN THE SUPREME COURT
OF THE UNITED STATES

Supreme Court, U.S.
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JOHN F. KOWALSKI,
Judge of the 26th Circuit Court
of Michigan, et al
Petitioners

v

JOHN C. TESMER, et al
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR WAYNE COUNTY, MICHIGAN AS AMICUS, SUPPORTING PETITIONER

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Statement of The Question

I.

Through its Constitution, Michigan provides an appeal of right to all defendants convicted by trial but only a discretionary appeal by leave to those convicted by plea. Michigan statute prohibits the appointment of counsel for those convicted by plea except in specified circumstances, some of which *require* the appointment of counsel. Does anything in the United States Constitution require a State to appoint counsel for an indigent defendant to file a discretionary appeal from a plea of guilty?

Statement of Facts

Amicus joins in the Statement of Facts of the Petitioner.

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Argument

I.

A defendant is not constitutionally entitled to the appointment of counsel to prepare a discretionary application for leave from his conviction by way of a plea of guilty.

The precise rationale for the Griffin *and* Douglas *lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached....* [1]

I. Introduction

A. <u>The Michigan Constitutional and Statutory Scheme</u>

In Article 1, § 20, the Michigan Constitution provides a right of appeal to those convicted in criminal cases, except that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." The restriction to a discretionary appeal by leave for those convicted by way of a plea was added by the People of the State in 1994, approving a ballot proposal to achieve this result.[2] As a consequence, the Michigan legislature enacted MCL 770.3a, which prohibits the appointment of counsel for preparation of

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1. *Ross* v *Moffitt*, 417 US 600, 94 S Ct 2437, 41 L Ed 2d 341 (1974).

2. 1994 Senate Joint Resolution D, ratified at the November 8, 1994, general election as Ballot Proposal B.

the application for leave to appeal from a conviction by plea, with certain exceptions. Counsel *must* be appointed:

- If the prosecuting attorney seeks leave to appeal;
- if the defendant's sentence exceeds the upper limit of the minimum range of the sentencing guidelines;
- if the defendant seeks leave to appeal from a conditional plea; and
- if the Court of Appeals or Supreme Court grants the defendant's application for leave to appeal.

Further, the trial court has the discretion to appoint counsel where:

- the defendant seeks leave where the sentence is based on an alleged improper scoring of an offense or prior record variable, *and*
- the defendant objected to the scoring or otherwise preserved the issue for appeal, *and*
- the sentence imposed constitutes an upward departure from the upper limit of the minimum range if the guidelines were scored as the defendant claims appropriate.

B. <u>The 6th Circuit Opinion</u>

In its opinion[3] the Sixth Circuit, overturning the panel decision, and disagreeing with the Michigan Supreme Court, affirmed a district court order enjoining certain Michigan judges from failing to appoint counsel for defendants

3. *Tesmer v Granholm*, 333 F3d 636 (CA 6, 2003).

convicted by way of plea of guilty who wish to avail themselves of Michigan's appeal procedure for those who are convicted by plea–an application for leave, seeking discretionary review in the Michigan Court of Appeals. The result is that some judges in the State are enjoined, while the rest of the judges in the State are not, the Michigan statute that prohibits appointment of counsel for defendants who have been convicted by plea for preparation of an application for leave other than in specified circumstances has been held unconstitutional, and a Michigan Supreme Court decision (from which this Court denied certiorari) is cast aside.[4] Principles of neither due process nor equal protection support the decision of the Sixth Circuit.

Amicus believes it wise always to begin with the actual language of the constitutional provision or provisions at issue, for reference only to the judicial gloss which has been given the relevant provisions or provisions can lead one far astray. As has been noted in a related context,

> Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the Court further and further from the meaning of the (provision). ...there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the (text) that obedience to text must overcome fidelity to logic.....: "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a

4. *People v Bulger*, 462 Mich 495, 614 N.W.2d 103 (2000), cert. denied, 531 US 994, 121 S Ct. 486, 148 L Ed 2d 459 (2000).

> reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'"[5]

Amicus thus begins with the relevant text.

> The 14th Amendment provides, in relevant part: No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The search for a possible constitutional basis for a right to counsel on a first appeal when that appeal is discretionary with the appellate court is difficult, and the cases from this Court are often less than clear, complicating the matter, for to this day "(t)he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated." *Ross v Moffitt*, supra. Amicus will look to Due Process and Equal Protection principles,[6] beginning the hunt with the Due Process Clause.

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5. *National Labor Relations Board* v *International Brotherhood of Electrical Workers*, 481 US 573, 107 S Ct 2002, 95 L Ed 2d 557 (1986)(Scalia, concurring).

6. Justice Thomas has said in a closely related context: "I therefore analyze petitioner's claim under both the Due Process and Equal Protection Clauses. If neither Clause affords petitioner the right...(claimed), I assume that no amalgam of the two does." *M.L.B.* v *S.L.J.*, 519 US 102, 117 S Ct 555, 136 L Ed 2d 473 (1996) (Thomas, J, dissenting, 117 S Ct at 570).

II. The Due Process and Equal Protection Clauses

A. Due Process and Appeals

It is not necessary in this case to step into the quagmire that is the oxymoron of "substantive due process."[7] On any plausible reading of the text the Due Process Clause sets *no* "right" of persons beyond the reach of government, instead specifically providing that an individual *can* in fact be deprived by the State of his or her property (in whatever aspect), his or her liberty (in whatever aspect), and even his or her very *life*, the Clause containing the limitation that any such deprivation *must* occur in accordance with "due process of law," which protection plainly is, then, a procedural guarantee. How a constitutional provision which expressly authorizes the taking of life, liberty, or property, so long as in accordance with due process of law, has come to be viewed as mandating recognition of certain interests which are "undeprivable" no matter the sort of process provided, remains something of a mystery.

Here, though, "substantive" process plays no part, for this case concerns the Due Process Clause in its obvious procedural form, at issue being the quintessential "liberty"

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7. "[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' ... Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms--sort of like 'green pastel redness.' " John Hart Ely, *Democracy and Distrust*, p. 18 (1980). See also *National Paint* v *City of Chicago*, 45 F3d 1124, 1128 (CA 7, 1995) ("Plaintiffs...assert...that the ordinance is a violation of substantive due process. Now we have spent some time looking through the Constitution for the Substantive Due Process Clause without finding it"); *Mays* v *City of East St. Louis*, 123 F3d 99, 1001 (CA 7, 1997)("...'substantive due process' is an oxymoron").

interest of individuals, deprivation of which by the State is contingent upon due process of law–a criminal conviction results in the loss of liberty either by confinement or through restrictions associated with probation, and perhaps some loss of property through fine. This deprivation of liberty must, as commanded by the 14th Amendment, occur in accordance with "due process" of law. The bulk of the process which is "due" a criminally accused appears in specific portions of the Bill of Rights, applied to the States through the doctrine of selective incorporation. Thus, the accused is protected by, among others, principles of double jeopardy, the right against self-incrimination, the right to a speedy trial, the right to a public trial, the right to fair notice (to be informed of the nature and cause of the accusation), the right to confrontation, the right to compulsory process, and the right to the effective assistance of counsel. Other requirements essential to fair procedure have been identified, which generally are subsidiary to these rights, such as the right to an impartial judge, the right to an impartial jury, the right not to be compelled to trial garbed in identifiable jail clothing (thereby compromising the right to an impartial fact-finder), and so on. But what of the right to appellate review? Is there a right under the Due Process Clause to appellate review of a criminal conviction as a necessary requisite to the deprivation of liberty permitted by that Clause so long as in accordance with due process?

The answer, of course, is "no," as has been established for over a century. The lead case is *McKane* v *Durston*.[8] There the accused was convicted at trial with election fraud and sentenced to Sing Sing prison for six years. He was neither entitled to bail nor admitted to discretionary bail, and claimed a constitutional right to bail pending appeal; in essence, he claimed that he was due the "process" of an appeal *before* his liberty could constitutionally be restrained.

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8. *McKane* v *Durston*, 153 US 684, 14 S Ct 913, 38 L Ed 867 (1894).

Writing for a unanimous Court, the first Justice Harlan observed that

> A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary. It is therefore clear that the right of appeal may be accorded by the state to the accused *upon such terms as in its wisdom may be deemed proper.*[9]

The point has been reiterated time and again.[10] After all, no appeals from convictions in the federal courts were permitted until late in the 19th century.[11]

It ineluctably follows from the fact that the process which is "due" before liberty may be taken by way of a criminal prosecution does not include the right to appellate review that when appellate review *is* provided it may, at least

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9. 153 US at 687, 14 S Ct at 915 (emphasis supplied).

10. See *Griffin* v *Illinois*, 351 US 12, 76 S Ct 585, 590, 100 L Ed 891 (1956)("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all"); *Ross v Moffitt*, supra, 94 S Ct at 2442 ("...a State is not obliged to provide any appeal at all for criminal defendants"); *Pennsylvania* v *Finley*, 481 US 551, 107 S Ct 1990, 1993, 95 L Ed 2d 539 (1987)("...it is clear that the State need not provide any appeal at all"); *M.L.B. v S.L.J.*, supra, 117 S Ct at 560 ("...the Federal Constitution guarantees no right to appellate review....").

11. See *Griffin v Illinois*, supra, 76 S Ct at 591 (Justice Frankfurter, concurring).

under the Due Process Clause, be "accorded by the state to the accused *upon such terms as in its wisdom may be deemed proper,"* as the formidable first Justice Harlan wrote for the Court over a century ago. The Due Process Clause simply has nothing to say about whether provision of a discretionary first appeal rather than a first appeal of right requires the appointment of counsel, for that Clause does not require the existence of the process of an appeal of any sort in the first instance. This leaves the Equal Protection Clause as the only possible source of a constitutional command that counsel be appointed on a discretionary first appeal, for though the Due Process Clause does not require the process of an appeal, if the State decides, by law, to provide for an appeal, then it must not deny to any person the "equal protection" of that law.

B. <u>Equal Protection and Appeals</u>

The respondent, however, can find no succor in the Equal Protection Clause. That Clause "confers no substantive rights and creates no substantive liberties."[12] The equal protection claim is that those who have sufficient funds can hire counsel to represent them to prepare and file an application for leave to appeal, while those without sufficient funds are without counsel unless the State assists them by providing counsel at State expense. Does the Equal Protection Clause require that the State provide this affirmative assistance, or is this a matter for the political branches of government to decide?

As an initial matter, amicus has trouble understanding how a constitutional provision establishing a neutral method of seeking review of a conviction entered by way of a plea of guilty is nonetheless discriminatory against the poor and

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12. *San Antonio Independent School District* v *Rodriquez*, 411 US 1, 93 S Ct 1278, 1309, 36 L Ed 2d 16 (1973)(Stewart, J., concurring).

denies "any person...equal protection of the laws" simply because some people will be unable to pay for counsel to assist them in seeking review,[13] for it cannot be gainsaid that the portion of Article 1, § 20 in question is neutral on its face. Though reasonable people can perhaps disagree regarding the wisdom of the 1994 amendment, there is no question that its purpose was non-discriminatory. The genesis of the amendment was a backlog in the Michigan Court of Appeals causing at least a two year delay from the filing of an appeal to decision.[14] Pursuant to the call of the President of the State Bar of Michigan, the State Bar Board of Commissioners created a special Task Force to study the backlog problem, and that Task Force recommended a constitutional change in guilty plea appeals, so that where the defendant was made aware of the sentence to be imposed prior to the plea, and that sentence was imposed, appeal would be by leave; the Task Force also expressed its view that the right to a transcript and to counsel should remain.[15] These recommendations ultimately became the amendment to Article 1, § 20, eliminating the appeal of right in guilty plea and nolo contendere convictions, and saying nothing about counsel.

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13. Cf. *Washington* v *Davis*, 426 US 229, 96 S Ct 2040, 2050, 48 L Ed 2d 597 (1976)"As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." 96 S Ct at 2050.

14. See Robert Webster, "Introduction to the Report of the Task Force on Appellate Courts," 7 Mich B J 895 (1993).

15. See 7 Mich B J at 898, and also Mr. Ward's dissent at 903-904

The Amendment is the law of Michigan, and it cannot be argued that there was any purpose on the part of the Legislature or the People of the State to discriminate against the poor. An equal protection claim thus must rest on an argument that the Amendment has a "disparate impact" on the indigent, who will be less able to avail themselves of the application for leave process successfully than those who can afford to retain counsel. But under well-settled equal protection doctrine, disparate impact, even if proven, is insufficient to raise a constitutional claim as against a facially neutral statute (or constitutional provision).[16]

That a "disparate impact" is insufficient to support an equal protection claim was made absolutely clear by this Court in *Washington v Davis*. The claim brought was that a portion of an employment test for police officer in the District of Columbia, neutral on its face, denied equal protection to black applicants because a higher percentage of black applicants failed that portion of the test than did Caucasian applicants. The Court disagreed, observing that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[17] A discriminatory *purpose* is a necessary part of an equal protection claim, for a "rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions

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16. See *San Antonio Independent School District*, supra, rejecting a claim that Texas school financing denied equal protection of the law to the poor, makes the point, observing that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." 93 S Ct at 1292.

17. 96 S Ct at 2046.

about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more *burdensome to the poor* and to the average black than to the more affluent white."[18]

Davis was followed in *Village of Arlington Heights* v *Metropolitan Housing Development*.[19] An equal protection challenge to zoning requirements which prevented the building of multi-family low income housing was rejected as absent was any showing of discriminatory purpose. *Davis* made it clear, said the Court, that an official action "will not be held unconstitutional solely because it results in a ...disproportionate impact;" rather, "(p)roof of ...discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," *Davis* simply reaffirming "a principle well established in a variety of contexts." 97 S Ct at 563 (see also *Smith* v *Boyle*, 144 F3d 1060, 1064 (CA 7, 1998): "...to be actionable a denial of equal protection must be intentional....disparate impact–a law's unintentionally bearing harder on one group than another–is not a permissible basis for finding a denial of equal protection"; *McLean* v *Crabtree*, 173 F3d 1176, 1185 (CA 9, 1999): "...discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause"; *Keevan* v *Smith*, 100 F3d 644, 651 (CA 8, 1996): "Because the policy challenged by the appellants is neutral on its face, the female prisoners must establish that the alleged disparate impact is the result of discriminatory purpose," the court rejecting a claim that a prison industry program discriminated on the ground of sex; *Black* v *Secretary of Health and Human Services*, 93 F3d 781, 788 (CA Fed, 1996): the court rejecting a claim of equal protection based on

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18. 96 S Ct at 2050 (emphasis supplied).

19. *Village of Arlington Heights* v *Metropolitan Housing Development*, 429 US 252, 97 S Ct 555, 50 L Ed 2d 450 (1977).

indigency, noting that "...the fact that the statute may have a *disparate impact on indigents* does not call for heightened scrutiny under equal protection principles"; *Tucker* v *United States Department of Commerce*, 958 F2d 1411, 1413-1414 (CA 7, 1992): rejecting a "census undercount" claim, remarking that the "..only discrimination forbidden by (the Equal Protection Clause) is intentional discrimination. Disparate impact, which means the unintended consequences of measures adopted for reasons unrelated to any intention to discriminate, is not, under this Court's current interpretation of the Constitution, an acceptable basis for a finding of unconstitutional discrimination...."

Moreover, even if it could be shown that the legislature and/or the People of the State had intentionally created a classification based on ability to pay, "neither indigents nor prisoners are a suspect class," so that "such differentiation is permissible as long as even a rational basis for the differing treatment can be shown."[20] While reasonable people might disagree as to whether the Amendment to Article 1, § 20 is sound policy, no reasonable person could support a contention that it is unsupported by a "rational basis." It is certainly rational to treat guilty plea cases and convictions arising from trials differently in terms of appeal.

Under current Equal Protection Clause principles, then, there can be no successful claim that the Clause requires the appointment of counsel for a discretionary first appeal because there can be shown no intent to discriminate, and a failure to "carry (the) burden of proving that discriminatory purpose was a motivating factor....ends the constitutional inquiry....(proof of) a discriminatory 'ultimate effect' is

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20. *Wilson* v *Yaklich*, 148 F3d 596 (CA 6, 1998); see also San Antonio Independent School District, supra; *Harris* v *McRae*, 448 US 297, 100 S Ct 2671, 65 L Ed 2d 784 (1980).

without independent constitutional significance."[21] Moreover, even if a "discriminatory purpose" could be shown, the classification is supported by a rational basis.

III. "Access to The Courts"

A. Griffin, Douglas, and Moffitt

Analysis should begin with *Griffin*. That case involved a state appeal of right from a criminal conviction, the question being whether the State of Illinois could "administer this statute so as to deny adequate appellate review to the poor while granting such review to all others" by requiring that all appellants, without regard to ability to pay, file a bill of exceptions, which could not be prepared without a transcript of the trial proceedings. The plurality addressed the question under the "Due Process and Equal Protection Clauses of the Fourteenth Amendment," without differentiating the two, but the opinion of Justice Black clearly sounds in equal protection. That opinion agreed that a State is "not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," but held that when a State does grant appellate review it cannot do so in a way "that discriminates against some convicted defendants on account of their poverty," the convicted defendants being protected "from invidious discriminations." Concluding that "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts," the Court held that either a transcript must be provided or some "other means of affording adequate and effective appellate review to indigent defendants."[22] Justice Frankfurter concurred, supplying the fifth vote, on equal protection grounds. Though, he said, "a

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21. *Arlington Heights*, supra, 97 S Ct at 566.

22. 76 S Ct at 590-591.

State need not equalize economic conditions," where it has provided a right to appellate review of convictions it cannot set up a system which in effect *completely forecloses* the indigent from its use.[23]

Justice Burton, for himself and Justices Minton, Reed, and Harlan, dissented. The Illinois system could not, Justice Burton said, deny due process, given that the process of an appeal is not required by the constitution at all as a necessary prerequisite to the taking of liberty pursuant to a criminal conviction. An equal protection question could be raised, but the claim would be unavailing, for the State is not required to equalize economic conditions before its bar of justice, and the law was neutral ("open to all") on its face, a discussion presaging *Davis* and *Arlington Heights*. Justice Harlan in a separate dissent also found no due process or equal protection violations, for the statute was in fact neutral, and what the majority had decided was not that the State of Illinois had discriminated but that it had a duty *to* discriminate. Again, the language sounds much like the modern equal protection analysis in *Davis*, *Arlington Heights*, and many other cases. To the extent a rationale can be discerned from the case, it is an equal protection case, employing an analysis that is today clearly discredited.

In much the same vein is *Douglas*. Again the case concerned an appeal granted by state law as of right to a convicted defendant. The petitioners were denied their request for appointment of counsel on the appeal of right. The Court agreed with the dissenting justice in the California Supreme Court that "denial of counsel on appeal (to an indigent) would seem to be a discrimination at least as invidious as that condemned in *Griffin*...."[24] The majority held that as with *Griffin* "the evil is the same–discrimination against the indigent," which it found could not be permitted

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23. 76 S Ct at 592-593.

24. 83 S Ct at 815.

"with the first appeal, granted as a matter of right to rich and poor alike... from a criminal conviction."[25] Only a fleeting reference was made to any constitutional provision compelling the appointment of counsel–the 14th Amendment–and no mention was made of some separate right of "meaningful access to the appellate process." The ground of decision, from the language employed, was plainly one of equal protection, through an analysis that no longer obtains in equal protection jurisprudence, the statute being neutral on its face, and there being no demonstration of any purposeful discrimination. Justice Harlan dissented once again, rejecting the analysis of the majority in language that is strikingly similar to contemporary equal protection doctrine:

> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.....no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purpose of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses....Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States "an affirmative

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25. 83 S Ct at 816.

> duty to lift the handicaps flowing from differences in economic circumstances.[26]

This opinion, as can readily be seen, reads precisely like modern equal protection cases.

The Court in *Ross v Moffitt*, supra, declined to extend *Douglas* beyond the "first appeal of right" to require counsel "for discretionary state appeals and for applications for review in this Court."[27] The Court held that *Griffin* and related decisions concerned "state-imposed financial barriers" which effectively "*cut off* appeal rights for indigents while leaving open avenues of appeal for more affluent persons," while *Douglas*, to insure that an indigent's "access to the appellate system was adequate," had required the appointment of counsel for "initial appeals as of right." And even *Douglas*, the Court quoted, had observed that a "state can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination....Absolute equality is not required; *lines can be and are drawn and we often sustain them*."[28]

The ground of decision in *Griffin* and *Douglas* was difficult to discern, found the Court in *Moffitt*. To the extent that Due Process or Equal Protection were employed in those cases, the Court did not believe that either Clause could be viewed as commanding the appointment of counsel for a discretionary appeal. The Court contrasted the appeal from the trial, as in the appeal "it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below." The question of appointment of counsel under due process

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26. 83 S Ct at 361-362.

27. 94 S Ct at 2438.

28. 94 S Ct at 2443 (emphasis supplied).

principles, the Court said, makes little sense in the context of an appeal, given that there is no Due Process right to an appeal at all; rather, the "question is more profitably considered under an equal protection analysis." The Court concluded that *Griffin*, *Douglas*, and similar cases stand for the proposition that the indigent defendant cannot be "entirely cut off from any appeal at all" or left with a "meaningless ritual,"[29] and that provision of counsel for a discretionary appeal is not required by Equal Protection principles. Once again, under current equal protection principles the issue would be readily resolved: the existence of a neutral statute, and the absence of a discriminatory intent, would be the end of the inquiry.

Griffin, *Douglas*, and *Moffitt*[30] do not establish any right to "meaningful access to the appellate process" as a part of Due Process, which would, given the lack of a right to an appellate process at all, be impossible; the most that can be said is that the cases preclude the *foreclosure* of an appeal to an indigent that is available to those with funds, or the provision of a "meaningless ritual" to the indigent, and this on an Equal Protection rationale which has been *repudiated by current Equal Protection doctrine*. Given current Equal Protection doctrine, the cases have no constitutional foundation. This is not to say that this Court must necessarily overrule them. But it is certainly appropriate for the Court not to *extend* them; that is, to say, "this far, and no further," given the lack of a constitutional command allowing the exercise of judicial authority to compel the appointment of counsel for an indigent defendant on a discretionary appeal, be it the "first"

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29. 94 S Ct at 2444

30. And, of course, *Moffitt* has been followed: see *Wainwright* v *Torna*, 455 US 586, 102 S Ct 1300, 71 L Ed 2d 475 (1982) and *Pennsylvania v Finley*, supra ("...the right to appointed counsel extends to the first appeal of right, and no further").

appeal or not. There is simply no escaping that the Due Process Clause cannot be violated by the manner in which process is given when that process is not required at all by the Due Process Clause, and that Equal Protection cannot be violated absent discriminatory purpose with a neutral law, which is lacking in this case.

B. "Access to the Courts" and the "Prisoner's Rights" Cases

The case generally recognized as the progenitor of the "access to the courts" constitutional doctrine is *Ex parte Hull*.[31] *Hull* concerned a prison regulation requiring that petitions for habeas corpus be submitted by inmates to a prison administrator for a determination that they were "properly drawn" before filing with the federal court. If the administrator did not approve the petition, it could not be filed. This Court simply held that whether a petition for a writ of habeas corpus addressed to a federal court is "properly drawn" is not a matter for determination by the executive branch of government through its bureaucracy, but for the "court alone to determine." No affirmative obligations by way of assistance to the prisoner were required in *Hull*; rather, the Court held that the executive branch has no business blocking ("abridging or impairing") the filing by prisoners of petitions with a court.

The second lead case, *Johnson* v *Avery*,[32] also imposed no obligation of assistance on the State, instead precluding a different form of State "abridgement or impairment" of inmates filing of legal papers in a federal court. The prison regulation in the Tennessee prison

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31. *Ex parte Hull*, 312 US 546, 61 S Ct 640, 85 L Ed 1034 (1941)

32. *Johnson* v *Avery*, 393 US 483, 89 S Ct 747, 21 L Ed 2d 718 (1969)

prevented inmates from advising or assisting one another in the preparation of habeas corpus petitions. Given the isolation of inmates from the general population, the rule had the effect, held the Court, of a rule which forbade illiterate or poorly educated prisoners from filing habeas corpus petitions. In the absence of the provision of some other alternative, the regulation thus denied some prisoners access to the court in violation of *Hull*. *Avery* was then followed in *Wolff* v *McDonnell*.[33] Taking up the invitation of the Court in *Avery*, the Nebraska prison system precluded inmates from assisting one another generally in the preparation of petitions for habeas corpus and civil rights actions, instead providing an alternative, an inmate legal advisor, appointed by the Warden. The Court held that *Avery* extends to civil rights petitions as well as habeas corpus petitions, and directed that the district court hold a hearing to determine the adequacy of the assistance provided by the inmate legal advisor "under the reasonable-alternative standard of *Avery*."[34] Other than the extension to civil rights actions, the rationale of the decision was precisely that of *Avery*–avoidance of the denial to an illiterate or poorly educated inmate of the ability to file a civil rights action. Then came *Bounds* v *Smith*,[35] to be repudiated in part in *Lewis* v *Casey*, supra.

Bounds conflated the *Griffin/Douglas* line of cases–decided, as has been discussed, on an equal protection theory which the Court had made clear *in Davis* was no longer the law, those cases and their validity not being, however, before the Court in *Davis*–with the *Hull/Avery/Wolff* line of cases, decided on the due process theory that access to

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33. *Wolff* v *McDonnell*, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974).

34. 94 S Ct at 2986.

35. *Bounds* v *Smith*, 430 US 817, 97 S Ct 1491, 52 L Ed 2d 72 (1977),

the federal courts to file original habeas corpus petitions and original civil rights actions cannot be "abridged or impaired" by the State, but providing no obligation of affirmative assistance on the State, to invent an affirmative obligation on the part of the State to provide either an adequate law library for inmate use or some reasonable alternative, such as the assistance of "persons trained in the law." The Chief Justice, Justice Rehnquist, and Justice Stewart dissented, Justice Rehnquist arguing that the Court had created the right it was announcing "virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived."[36]

The Court drew back to a degree, however, in *Lewis v Casey*.[37] Inmates in the Arizona Department of Corrections filed a federal lawsuit pursuant to *Bounds* on the ground that the legal assistance provided by the prison system was inadequate. The federal district court entered an injunctive order specifying in minute detail the hours for the prison library, the hours of use of the library per week to which an inmate was entitled, the minimum educational requirements for the prison librarians (a library science, paralegal, or law degree), the content of a videotaped legal-research course for inmates which the court required be prepared, the regulations for access to the library by prisoners in disciplinary or security segregation, that illiterate and non-English speaking inmates be provided direct assistance from lawyers, paralegals, or a sufficient number of prisoner legal assistants, that bilingual inmates be located and trained as legal assistants, and the like. This Court reversed.

The Court agreed with the State that the systemic challenge of the inmates was unsupported by the record, their being no proof of widespread actual injury under *Bounds*, the

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36. 97 S Ct at 1503.

37. *Lewis v Casey*, 518 US 343, 116 S Ct 2174, 135 L Ed 2d 606 (1996).

district court doing no more than identifying isolated instances of injury. But beyond this the Court also retreated from *Bounds*, remarking that:

> it must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied....These statements appear to suggest that the State must enable the prisoner to *discover grievances*, and to *litigate effectively* once in court....These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, *and we now disclaim them*....the tools (*Bounds*) requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement.[38]

Inmates do not have a right to become "litigating engines"–they have no right to the assistance of the State to help them "to discover grievances, and to litigate effectively once in court."[39] Rather, because of the "fundamental importance in our constitutional scheme" of the writ of habeas corpus, an original civil action in the federal courts, "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[40] Because the Court could find "no reasonable distinction" between the original action of a petition for writ of habeas corpus and a civil rights action, alleging constitutional error in the manner of treatment or confinement of a prisoner, the Court in *Wolff* held that *Avery* applies to civil rights actions, finding also in

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37. 116 S Ct at 2181 (emphasis supplied).

38. *Lewis v Casey*, 116 S Ct at 2181.

39. See *Wolff v McDonnell*, 94 S Ct at 2985.

these cases that without some form of assistance through either legal assistants or the provision of a law library inmates' ability to have access to the courts to file these original actions is, as a practical matter, "impaired or obstructed." The right to counsel clearly is not required in these cases.

This right of access to the courts cannot, of course, belong only to inmates of correctional institutions, lodged there after a conviction, and who have no due process right to challenge their conviction further through an appellate process, but *must belong to the* ***innocent*** *as well* ~~*to* ***all*** *of us!* The innocent, however, are not being held in custody, but may wish to bring, in certain circumstances, civil rights actions against the Government. Civil rights actions are scarcely the private domain of the criminally convicted. If a citizen wishes to bring a civil rights action against the Government he or she will not be forgiven the filing fee, will not be provided counsel, and will not be provided either a law library or a legal assistant. Can it be that those convicted of a crime and incarcerated have a right of access to the courts to file original actions challenging the actions of the Government superior to that of innocent citizens? How can this difference in treatment be explained?

Amicus submits that the difference in treatment can only sensibly be explained in one way. As has been explained, the Equal Protection Clause serves no function of "equalizing economic conditions" or opportunities, and so all ordinary citizens, at least hypothetically, have access to the courts, to legal assistants, and to law libraries in that *they are available* if one can avail him or herself of them. But an inmate, by virtue of his or her confinement, has no such hypothetical or possible access; he or she cannot visit a public library, or call upon friends and neighbors for legal advice. His or her access to the courts *to challenge an action or actions of the Government as it affects the inmate personally* is "abridged or restricted" by the *fact* of confinement, though the fact of that confinement be consistent with Due Process of Law.

To the extent there exists a right to "access to the courts," then, it perforce belongs to all citizens and not only inmates, and prevents civil rights actions against the Government from being "impaired or abridged." While for ordinary citizens the Government is under no duty to provide any affirmative assistance whatsoever to the citizen who sues or wishes to sue because that individual at least has the hypothetical opportunity to gain whatever legal assistance may be necessary, including through access to legal materials, the inmate lacks this hypothetical opportunity unless the Government assists him either through the provision of legal materials or in some other manner–but the appointment of counsel is not required.

IV. Conclusion

There can be no "Due Process" right to "meaningful access" to the appellate process, as liberty may be restrained consistent with Due Process of law after a criminal conviction without any appellate process. *Griffin*, *Douglas*, and *Moffitt* are in truth Equal Protection Clause cases, establishing a right to a transcript and the right to counsel on an *appeal of right*, but based on an equal protection theory *which has been firmly and repeatedly repudiated*. An equal protection violation requires a discriminatory motive, which is absent from these cases and from the present case.

Whether counsel should be provided an indigent defendant convicted by way of plea who wishes to invoke a mechanism for discretionary review is a matter for the political branches of government. No provision of the Constitution can justify judicial intervention, unless we are to "render democratically adopted texts mere springboards for judicial lawmaking."[41]

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40. Scalia, *A Matter of Interpretation*, p.25 (Princeton University Press, 1997).

RELIEF

WHEREFORE, amicus submits that the 6th Circuit Court of Appeals should be reversed.

Respectfully submitted,

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